(13)

No. 608

In the Supreme Court of the United States

OCTOBER TERM, 1943

CHARLES B. VAN DUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 44–48) is a memorandum opinion not officially reported. The opinion of the Circuit Court of Appeals (R. 61) is reported in 138 F. 2d 510.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 18, 1943. (R. 61.) The petition for a writ of certiorari was filed January 15, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when the taxpayer created a trust to pay the premiums on insurance policies on the life of his wife, and at the same time the wife created a similar trust to pay the premiums on insurance policies on the life of the husband, the income of the taxpayer's trust so employed constitutes taxable income of the taxpayer under Sections 22 (a) and 167 of the Revenue Acts of 1936 and 1938.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The taxpayer on February 26, 1931, created an irrevocable trust of which his four sons were trustees. He assigned to the trust 10,000 shares of the common stock of the S. S. Kresge Company and seven life insurance policies owned by him in the aggregate amount of $200,000 on the life of his wife, Minnie B. Van Dusen. (R. 45.)

The trust instrument, which is set out in full as Joint Exhibit A–1 (R. 30–43), provided in paragraphs 3 and 4 that the trustees should collect the income of the trust and apply the same, insofar as necessary, to the payment of the premiums upon the assigned insurance policies on the life of the wife (R. 31–32, 45). Should

the income of the trust exceed the amount necessary for the payment of the premiums the trustees had absolute discretion either to pay the excess to the taxpayer or to add the same to the corpus of the trust (R. 32, 46).

The trust further provided (Par. 5) that on the death of Minnie B. Van Dusen the trustees should collect the sums payable on the life insurance policies on her life and add them to the principal of the trust. Fifty percent of the net income of the augmented trust would be distributed to the grantor for life, and fifty percent would be divided equally among his surviving children. (R. 33, 46.)

On the death of the taxpayer, the trustees were directed to divide the trust estate into four equal parts for the benefit of the taxpayer's four sons, paying to each of them the income until he attained the age of 40, and on attaining such age, his share of the principal. There were detailed provisions for the distribution of the corpus and income of the trust, if any son should predecease the taxpayer, or die before reaching the age of 40, to the surviving issue, or spouse of each son, or if none, to the surviving brothers. (Par. 6, R. 33–39, 46.)

The trustees were further empowered to use any portion of the principal of the trust to purchase property from or to make loans to the executors and/or trustees of the estate of Minnie B. Van Dusen, if deemed by them to be for the

best interests of the beneficiaries of the trust (R. 39–40).

It also appears from the companion case of *Minnie B. Van Dusen* v. *Commissioner,* No. 609, heard, submitted, and decided by the Circuit Court of Appeals as one case with the instant case (R. 61), that on February 28, 1931, two days after the execution of the trust instrument by Charles B. Van Dusen, his wife, Minnie B. Van Dusen, executed to the same trustees a corresponding instrument of trust (No. 609, R. 24–39) to pay the premiums on his life insurance. In her case the fund of the trust consisted of 31,250 shares of the S. S. Kresge Company stock and insurance policies on the life of her husband, Charles B. Van Dusen, in the aggregate account of $900,000. (No. 609, R. 40–41.) The net income of this trust was payable entirely to Minnie B. Van Dusen upon the death of the husband and the collection of the insurance upon his life. The trustees of the trust were empowered to purchase property from or to loan money to the estate of the husband, Charles B. Van Dusen. The other provisions of the trust were substantially identical with those of the trust created by Charles B. Van Dusen.

The trustees of the two trusts reported as taxable income of the trusts the income involved in this case and in No. 609. (R. 12, 14, 22; No. 609, R. 10, 11, 19.) The Commissioner of Internal Revenue determined that the portion of the in-

come of the trust created by the taxpayer used to pay the premiums on the life insurance of the wife constituted taxable income of the taxpayer. (R. 10–15, 20–23.) He also determined that the portions of the income of the trust created by the wife used to pay the premiums on the life insurance of the husband constituted taxable income of the wife. (No. 609, R. 8–12, 17–20.) The Board of Tax Appeals upset this determination with respect to each of the trusts. (R. 44–48; No. 609, R. 39–44.) The Circuit Court of Appeals in one judgment (R. 61; No. 609, R. 55) reversed and remanded each case to the Tax Court for "further proceedings in accordance with the statute and the order of this court."

ARGUMENT

The decision in the present case is not, as taxpayer contends (Br. 14–16), in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Jergens*, 127 F. 2d 973. The court in that case said (p. 974), "Each case depends for decision on its own peculiar facts," and the facts in the two cases are entirely different. That case also involved a trust to pay the premiums on the insurance on the life of the spouse of the settlor, but the terms of the trust were substantially different from those of the trust here. More important, there was not in that case, as in this, a practically simultaneous trust created by the spouse of the

settlor to pay the premiums on the insurance on the life of the settlor. The existence of these two trusts, one by the husband to pay the premiums on the wife's life insurance, and the other by the wife to pay the premiums on her husband's life insurance, together with the other provisions of the trusts, the trustees and the beneficiaries of each trust being all members of the same family group, clearly distinguishes the present case from the *Jergens* case.[1]

The decision below is in full accordance with the principles declared by this Court in *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; and *Helvering* v. *Stuart,* 317 U. S. 154. Whether the trust created by the taxpayer and that created by his wife be considered separately or together, the settlor of each trust continued to enjoy the economic benefit of the trust, since the income thereof was employed for the further security of the settlor, the other spouse and their intimate family. By means of the trust the settlor obtained a satisfaction procurable only by the expenditure of money or money's worth. At the best there was only "a temporary reallocation of income within an intimate family group." *Helvering* v. *Clifford, supra,* at page 335. The trustees of each trust were the settlor's four sons. The income of each trust was used to pay the premiums

[1] For the same reason the present case is distinct from *Blumenthal* v. *Commissioner,* 30 B. T. A. 591, and *Baldwin* v. *Commissioner,* 36 B. T. A. 364, cited by taxpayer at Brief 16.

on the insurance on the life of the settlor's spouse. Any excess of income was either to be accumulated or to be paid to the settlor of the trust. On the death of the insured spouse, the insurance was to be collected, and the income of the augmented trust was to be paid in part or in whole to the settlor, the remainder to be held for the benefit of the sons and their respective families. Provision was even made for rendering financial aid by each trust to the estate of the deceased spouse.

But the two trusts in fact were closely related. They were executed within two days of each other; in each the four sons of the two settlors were trustees and ultimate beneficiaries. The corpus of each trust was stock in the same corporation. The verbiage of each trust was identical. The only substantial difference was that the income of the husband's trust was to pay the premiums on the insurance on the life of the wife, while that of the wife's trust was to pay the premiums on the insurance on the life of the husband. Also, in the husband's trust he was to have only fifty percent of the income of the augmented trust, while the wife was to have one hundred percent of the income of her augmented trust. It is thus clear that these two instruments must be considered together. *Helvering* v. *LeGierse*, 312 U. S. 531; *Whiteley* v. *Commissioner*, 120 F. 2d 782 (C. C. A. 3d); *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d).

It is not correct, as taxpayer asserts (Br. 19),

that neither spouse was a beneficiary or derived any benefit from the trust set up by the other spouse. The trust of each spouse was used to pay the premiums on the life insurance of the other spouse. This constituted a benefit to the one whose life insurance was paid, which is fully recognizable for tax purposes. Revenue Acts of 1936 and 1938, Sec. 167 (a) (3), Appendix, *infra; Burnet* v. *Wells*, 289 U. S. 670, 679–681. If under the normal procedure the husband had created a trust for the purpose of paying premiums on his own life insurance, and the wife had created a trust to pay premiums on her life insurance, it is clear that the income of the trusts so used would be taxable to the respective grantors. Revenue Acts of 1936 and 1938, Sec. 167 (a) (3). Individual surtaxes should not be avoided merely because the income of each trust was used to pay the insurance on the life of the other spouse.

The taxpayer complains (Br. 22–23) that the Circuit Court of Appeals did not analyze the facts found by the Board or the principles of law relied upon by the Board. But it is not true that the court made findings of fact of its own or disregarded the facts found by the Board. The facts in the case were all stipulated and the court below obviously accepted the Board's findings as being in accord with the stipulation. The court reversed the Board on a question of law. There is accordingly no merit to any suggestion that the

court exceeded its judicial authority in reviewing the Board's decision.

CONCLUSION

There is no conflict and the decision below is correct. The petition for certiorari should be denied.

Respectfully submitted.

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